THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

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By /s/

DAVID RAY HARRIS, Petitioner,	§	
	§	C.A. No. 1 :92-CV-167
vs.	§	Judge William Wayne Justice
GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§	

MEMORANDUM OPINION

Petitioner David Ray Harris ("Harris"), an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed a petition for the writ *of habeas corpus* pursuant to 28 U.S.C. § 2254. Harris challenged his capital murder conviction and the death sentence imposed in the Criminal District Court of Jefferson County, Texas, in cause No. 46204, *The State of Texas v. David Ray Harris.*

On December 6, 1999, this case was referred pursuant to 28 U.S.C. § 636(b)(l)(B) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges for proposed findings and

recommendations for the disposition of the case. The Court gave the parties the opportunity to submit additional pleadings before submitting its proposed findings and recommended disposition.

On June 25, 2001, The Hon. Wendell C. Radford, United States Magistrate Judge, entered his Report and Recommendation, recommending that the Court grant the petition in part, on the ground that Harris received ineffective assistance of counsel at the sentencing phase of his trial. Both Parties filed timely objections to the Report and Recommendation, Harris objecting to recommendations that several of his claims be denied, and the Director objecting to the proposed findings underlying the single claim upon which the Magistrate Judge recommended granting relief. Pursuant to 28 U.S.C. §636 (b)(1)(C), the Court is required to make a *de novo* review of those portions of the report and specified proposed findings and recommendation to which objections were made. The Court may then accept, reject, or modify, in whole or in part, the findings and recommendations made by the Magistrate Judge. As explained below, the Court finds that Petitioner's objection that the jury was unable to give effect to evidence that the victim shot first is well-taken, and therefore rejects the Magistrate Judge's recommendation that this claim be denied. Twice in response to objections, and once on its own motion, the Court makes minor modifications to the Magistrate Judge's proposed findings. In all other respects, the Court adopts the Magistrate Judge's Report and Recommendation.

Harris first objects to the Magistrate Judge's proposed finding that the jury was not precluded from considering mitigating evidence in the record. The record reveals that Harris presented evidence of improving conduct in prison, alcoholism which was responding to treatment, intoxication

at the time of the offense, cooperation with the police, and remorse for his actions. The Magistrate Judge proposed a finding that the jury could consider this evidence in the context of two of the special issues presented at sentencing: whether Harris' conduct in killing Mays was deliberate, and whether there was a probability that Harris would commit acts of criminal violence which would pose a continuing threat to society.

In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), a plurality of the United States Supreme Court held that the "future dangerousness" special issue gave the jury a vehicle to consider evidence of good conduct in prison. Concurring in the result, Justice O'Connor opined:

> If . . . petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to (his) moral culpability beyond the scope of the special verdict questions, the [special issues] would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.

Id. at 185. The next year, in *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989), the Court found that mental retardation and an abusive upbringing were examples of evidence which were relevant to a defendant's moral culpability but beyond the scope of the "deliberateness" and "future dangerousness" special issues.

Franklin disposes of that part of Harris' claim based upon prison conduct. In contrast to Penry's evidence of

mental retardation and abusive upbringing, it is found that Harris' alcoholism, intoxication, cooperation with authorities and remorse did not have relevance beyond the scope of the "deliberateness" and "future dangerousness" special issues. Thus the Court finds no merit in Harris' first objection.

Harris next objects to the Magistrate Judge's proposed finding that the special issues allowed the jury to give effect to evidence that Mays shot first. As explained above, the first issue is whether the evidence has relevance beyond the scope of the three special issues. The Magistrate Judge correctly found that this evidence was relevant to the third special issue, whether the killing was unreasonable in response to the provocation, if any, by the deceased. To give Harris a life sentence, the jury merely needed to answer this question in the negative.

The analysis does not end here, however. In *Penry v. Johnson*, ___U.S. ___, 121 S.Ct. 1910 (June 4, 2001), the United States Supreme Court recently held that jury instructions prevent a jury from giving effect to mitigating evidence if the instructions are internally contradictory and therefore confusing to the jury. The Court held unconstitutional the later Texas capital sentencing scheme in which each juror must first answer affirmatively the three special issues: "deliberateness," "future dangerousness," and "inadequate provocation," in order to sentence an offender to death. The jurors were instructed that if in considering mitigating evidence beyond the scope of the special issues they felt a life sentence was appropriate, they should change one of the answers on the special issues from "yes" to "no." The Court found that this scheme put jurors in the untenable position of giving untrue answers to the special issues in order to give effect to mitigating evidence. *Id.* at 1921-22.

Although the jury in this case did not receive the same instructions as were given in *Penry II*, the instructions they received caused a similar problem. In the guilt phase of his trial, Harris offered evidence that the victim shot him first in the context of two defenses: self defense, or, in the alternative, that he was guilty only of voluntary manslaughter, not murder. In rejecting his manslaughter defense, the jury found that the killing was not done while Harris was "under the immediate influence of sudden passion based upon adequate cause." A juror who believed that Harris should receive a life sentence instead of the death penalty because he killed his victim only after the victim shot him first, could only do so by answering in the negative the third special issue - that the killing was unreasonable in response to the provocation, if any, by the deceased. Because this would appear inconsistent with the answer given at the guilt phase of the trial, the juror could not logically answer this question in the negative; accordingly, the juror could not give mitigating effect to this evidence. It is found that this objection is meritorious.

Harris next objects that the special issues prevented the jury from considering evidence that Harris suffered emotional abuse as a child. As discussed above, the United States Supreme Court so held in *Penry I*. Unlike the defendant in that case, however, Harris did not attempt to introduce any evidence of his abusive upbringing. The Magistrate Judge correctly relied upon Fifth Circuit precedent which precludes attacking the adequacy of the special issues in the context of evidence not offered at trial.

Harris contends that because of that precedent, any attempt by counsel to offer such evidence would have been futile, and accordingly, he should be allowed to attack the constitutionality of the special issues despite not offering the evidence to which the jury was allegedly prevented from

giving effect. Prior to the federal evidentiary hearing, Harris argued that counsel's decision not to offer such evidence was tactical. The evidence at that hearing contradicted that argument; and as explained below, this Court agrees with, and adopts, the Magistrate Judge's proposed finding that Harris' trial counsel's decision not to introduce this evidence was instead based upon a mistaken assumption that Harris did not want such evidence introduced. The Court accordingly finds no merit in this objection.

Harris next objects to the Magistrate Judge's proposed finding that the flawed jury instruction on voluntary manslaughter was harmless error. Upon reviewing the record, the Court finds no evidence that the flaw in the instruction – incorrectly placing upon the defendant the burden of proving that Harris acted under the immediate influence of sudden passion based upon adequate cause - had a substantial and injurious effect on the jury's determination of its verdict. *See Mayabb v. Johnson,* 168 F.3d 863, 867-68 (5th Cir.), *cert. denied,* 528 U.S. 969, (1999). It is found that there is no merit in this objection.

Harris next objects that the Magistrate Judge erred in distinguishing the facts of his case from the facts in *Havard v. State,* 800 S.W.2d 195 (Tex.Crim.App.1989). Because *Havard* is a state-law case, and because the Court agrees with and adopts the Magistrate Judge's alternative analysis of this issue based upon *Mayabb,* a federal *habeas corpus* case, the Court finds it unnecessary to address this objection.

Harris next objects that the Magistrate Judge erred in denying his claim that the prosecutor's closing argument denied him a fair trial. Upon reviewing the record, the Court agrees with and adopts the Magistrate Judge's conclusion that although the prosecutor should not have argued that the people of the county expected a guilty verdict, his

misconduct was not pronounced or persistent, and the evidence of guilt presented was not so insubstantial that Harris would have been acquitted but for the prosecutor's statement. *See Jones v. Butler,* 864 F.2d 348, 356 (5th Cir. 1988), *cert. denied,* 490 U.S. 1075 (1989). No merit is found in this objection.

Harris next objects to the Magistrate Judge's proposed finding that his confession should have been suppressed because of unconstitutional actions by the police. Harris raised four sub-claims. The Court agrees with and adopts the Magistrate Judge's recommendation that Harris' claim that the search of his vehicle was unconstitutional is barred from consideration in federal *habeas corpus* pursuant to *Stone v. Powell,* 428 U.S. 465, 494-95 (1976). Upon reviewing the record, the Court agrees with and adopts the Magistrate Judge's proposed findings that Harris voluntarily and knowingly waived his rights under *Miranda v. Arizona,* 384 U.S. 436, 468-69 (1966), that police chief Kitrell did not exert undue psychological pressure on Harris in procuring his confession, and that Harris was not held for an unreasonable length of time before being taken before a state Magistrate Judge. No merit is found in this objection.

Harris next objects that the Magistrate Judge erred in proposing a finding that the wording of the three special issues is unconstitutionally vague. The Magistrate Judge correctly relied on *James v. Collins,* 987 F.2d 1116, 1119-20 (5th Cir.), *cert. denied,* 509 U.S. 947 (1993), in recommending that this claim be denied. It is found that there is no merit in this objection.

Harris next objects that the Magistrate Judge erred in proposing a finding that his trial counsel did not render ineffective assistance at the guilt/innocence phase of his trial. He raised ten sub-claims. As to each sub-claim, the

Magistrate Judge found that Harris could not establish one of the two elements of an ineffective assistance of counsel claim, which are, first, that his counsel's actions were objectively unreasonable, and second, had counsel acted reasonably, there is a reasonable probability that the result in the case would have been different. *See Strickland v. Washington,* 466 U.S. 668, 686-88 (1984).

Upon reviewing the record, the Court agrees with and adopts the following of the Magistrate Judge's proposed findings:

1. Harris did not establish that there was a reasonable probability that, had counsel argued that the search of Harris' truck was improper, the result of the guilt/innocence phase of his trial would have been different.

2. Harris did not establish that there was a reasonable probability that, had counsel cited legal authority in his motion to suppress Harris' confession, the result of the guilt/innocence phase of his trial would have been different.

3. Harris did not establish that there was a reasonable probability that, had counsel moved to suppress witness Lockard's initial identification of Harris on the grounds that it resulted from an impermissively suggestive line-up, and that her testimony was enhanced through hypnosis, the result in the guilt/innocence phase of his trial would have been different.

4. Counsel's tactical decision to defend Harris on the grounds that Harris either acted in self-defense, or in the alternative, that he was guilty only of voluntary manslaughter, rather than to pursue a defense that Harris was incapable of forming the specific intent necessary to sustain a conviction for first-degree murder, was not objectively unreasonable.

5. Harris did not establish that there was a reasonable probability that, had counsel further investigated the lie-detector test given to witness Lockard, the result in the guilt' innocence phase of his trial would have been different.

6. Harris did not establish that there was a reasonable probability that, had counsel objected to witness Lockard's testimony that he did not seem to be in a hurry when he got into his truck, the result in the guilt/innocence phase of the trial would have been different.

7. Harris did not establish that there was a reasonable probability that, had counsel objected to the prosecution's statement in closing argument (see p. 6) on the grounds that it was outside the record, the result in the guilt/innocence phase of his trial would have been different.

8. Harris did not establish that there was a reasonable probability that, had counsel challenged venirepersons LaFleur and Hernandez on the grounds that they had formed an opinion as to Harris' guilt, the result in the guilt/innocence phase of the trial would have been different.

9. Harris did not establish that there was a reasonable probability that, had counsel objected to the admission of two of the statements he made during interrogation – that he "was out looking for a piece" and that he fired the last shot at the victim in order to "finish him off" – the result in the guilt/innocence phase of Harris' trial would have been different.

10. Harris did not establish that there was a reasonable probability that had counsel, before trial, hired an expert witness to provide testimony on the issue of how far Harris was from his victim at the time he fired the final shot, or, had counsel requested a continuance during trial and attempted to

hire such an expert, the result in the guilt/innocence phase of his trial would have been different.

Because the Court agrees with and adopts the Magistrate Judge's proposed finding that Harris cannot establish the first element of the *Strickland* ineffective assistance of counsel test as to one of his ten sub-claims and that he cannot establish the second element of the test as to the other nine sub-claims, it is found that Harris' objection is without merit.

Harris next objects that the Magistrate Judge erred in proposing a finding that his trial counsel did not render ineffective assistance by providing information (beyond the scope ofa release he signed) to the producers of a documentary movie about a prior murder. Having reviewed the record, the Court agrees with and adopts the Magistrate Judge's proposed finding that Harris did not establish that there was a reasonable probability that, had Harris' counsel not provided the information to the producers of the documentary, the result in his appeal of the present case would have been different. It is found that this objection is without merit.

Harris next objects that the Magistrate Judge erred in finding that his counsel on appeal provided constitutionally effective assistance. Harris raised fifteen sub-claims. As to each, the Magistrate Judge found that Harris was unable to establish one of the two elements of the *Strickland* test for ineffective assistance of counsel. Upon reviewing the record, the Court agrees with and adopts the following of the Magistrate Judge's proposed findings:

1. Harris did not establish that there was a reasonable probability that, had appellate counsel properly presented his claim that the prosecutor made improper argument in the

punishment phase of Harris' trial, the result in the appeal would have been different.

2. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed on appeal that the trial Court erred in refusing his challenge for cause of venireperson Sowards, based upon her friendship with one of the prosecutors, the result in the appeal would have been different.

3. Harris did not establish that there was a reasonable probability that, had appellate counsel alleged the correct grounds in his claim on appeal that the trial court erred in denying trial counsel's challenges for cause of venirepersons Hernandez and Bloodsworth, the result in the appeal would have been different.

4. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed that the trial court erred in admitting evidence that Harris stole the gun with which he committed the killing, the result in the appeal would have been different.

5. Appellate counsel's decision not to claim that the trial court erred in denying trial counsel's motion to suppress Harris' statements, on the ground that the claim had little chance of prevailing on appeal, was not objectively unreasonable, and Harris did not establish that there was a reasonable probability that, had appellate counsel raised the claim, the result in the appeal would have been different.

6. Appellate counsel's decision not to claim that the trial court erred in denying trial counsel's motion to suppress Lockard's in-court identification of Harris, on the grounds that the claim had little chance of prevailing on appeal, was not objectively unreasonable, and Harris did not establish that there was a reasonable probability that, had appellate

counsel made the claim, the result in the appeal would have been different.

7. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed that the trial court erred in admitting a photograph of the victim taken before he was killed, there is not a reasonable probability that the result in the appeal would have been different.

8. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed that the trial court erred in admitting a videotape of the crime scene, the result in the appeal would have been different.

9. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed that the trial court erred in admitting hearsay testimony concerning an alleged fifth bullet casing found at the scene of the killing, the result in the appeal would have been different.

10. Appellate counsel's decision not to claim that the trial court erred in admitting testimony of witness Lockard's reaction to hearing Harris' voice at the line-up on the grounds that the issue had little chance of prevailing on appeal was not objectively unreasonable.

11. Harris did not establish that there was a reasonable probability that, had counsel claimed that the trial court erred in admitting witness O'Quinn's testimony about Harris' lack of remorse and his difficulty, if any, in firing the gun, the result in the appeal would have been different.

12. Appellate counsel's decision not to claim that the trial court erred in admitting testimony from Dr. Espinosa about the victim's position as he was struck by bullets, on the grounds that the issue had little chance of prevailing on appeal, was not objectively unreasonable.

13. Appellate counsel's decision not to claim that the trial court's allowing the prosecution to call Harris as a rebuttal witness following the conclusion of its cross-examination on the grounds that the claim had little likelihood of prevailing on appeal was not objectively unreasonable.

14. Appellate counsel's decision not to claim that the trial court erred in admitting the testimony of Dr. Gripon about the probability of Harris' future dangerousness, on the ground that the claim had little likelihood of prevailing on appeal, was not objectively unreasonable, and Harris did not establish that there was a reasonable probability that, had counsel made the claim, the result in the appeal would have been different.

15. Harris did not establish that there was a reasonable probability that, had counsel claimed that the trial court erred in refusing to provide the jury with a dictionary definition of the term "deliberate," an important term in the first punishment special issue, the result in the appeal would have been different.

Because the Court agrees with and adopts the Magistrate Judge's proposed finding that Harris cannot establish the first element of the *Strickland* ineffective assistance of counsel test as to three of his fifteen sub-claims, that he cannot establish the second element of the test as to nine of his fifteen sub-claims, and that he cannot establish either element of the test as to the remaining three of his fifteen sub-claims, it is found that this objection is without merit.

Harris next objects to the Magistrate Judge's proposed finding that the trial court's admission of evidence of offenses of which he had been acquitted did not deny him a fair trial. The Magistrate Judge properly relied on *Vega v. Johnson,* 149 F.3d 354, 359 (5th Cir. 1998), *cert. denied,* 525

U.S. 1119 (1999). It is found that this objection is without merit.

Harris next objects to the Magistrate Judge's proposed finding that the trial court did not deny him a fair trial by admitting testimony on the issue of the probability of Harris' future dangerousness by a psychiatrist who had not examined him. The Magistrate Judge correctly relied on *Barefoot v. Estelle*, 463 U.S. 880, 903 (1983). It is found that this objection is without merit.

Harris next objects that the Magistrate Judge erred in stating, in his discussion of Harris' ninth ineffective assistance of trial counsel sub-claim, that evidence was presented that the fatal shot, which was fired from a distance of one to two feet, was fired at the victim's head, instead of his torso. The Magistrate Judge's proposed finding was that, in light of evidence that Harris fired a fatal shot into the victim's head from a close distance, there was not a reasonable probability that, had counsel objected to the admission of testimony that Harris fired the final shot into the victim in order to "finish him off," the result in the guilt / innocence phase of the trial would have been different. See page 8. The Court modifies the Magistrate Judge's proposed finding by replacing the word "head" with "torso," and accepts and adopts the proposed finding as modified.

Harris next objects that the Magistrate Judge erred in his proposed finding that any alleged bias towards him by the Court of Criminal Appeals of the State of Texas was irrelevant to whether he received a "full and fair hearing" on his state application for post-conviction relief. Harris does not directly take issue with the proposed finding; rather, he contends that, "If the Court of Criminal Appeals was biased against Harris on direct appeal, that is clearly relevant to the constitutionality of Harris' conviction and sentence." The

Court agrees with this statement in the abstract, but although Harris alleged such bias, the single substantive legal error he alleges the Texas Court of Criminal Appeals made was in the context of the erroneous manslaughter charge, a claim this court has already found does not entitle Harris to relief. See page 5. It is found that this objection is immaterial.

Harris' final objection is that the Magistrate Judge erred in proposing a finding that the third special issue is not unconstitutionally vague, and that it provides an adequate mechanism for the jury to express its views regarding the appropriateness of the death penalty under the circumstances. This objection is a combination of two objections already made by Petitioner. The Court addressed the first objection on page 7 of this opinion and the second on pages 3-4, so it will not repeat itself here.

Respondent's first objection is that the Magistrate Judge erred in proposing finding that, on the claim of trial counsel's alleged ineffective assistance at the punishment phase of Harris' trial, the evidence produced by Harris was rebutted by clear and convincing evidence the presumption of correctness applicable to the findings of the Texas Court of Criminal Appeals on Harris' application for post-conviction relief. As a preliminary matter, the Court notes that under the law applicable at the time this petition was filed, the standard was "convincing" evidence, not "clear and convincing" evidence. *See Jackson v. Anderson,* 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied,* 522 U.S. 1119 (1998). The Magistrate Judge found that the State court's findings of fact were based upon affidavits submitted by trial counsel, and that counsels' testimony at the evidentiary hearing differed from their earlier affidavits on two material points: first, whether counsel conveyed all relevant facts to Harris, and second, whether the decision not to present

evidence of Harris' childhood was made voluntarily, knowingly, and intelligently by Harris.

Ignoring the discrepancy, Respondent contends that evidence in both counsels' affidavits and their later testimony supported the state judge's findings. The Magistrate Judge, however, was correct not to constrain his review to merely determining whether there was evidence in the record which would support the state court's finding; instead, he determined that the discrepancies between counsel's testimony at the evidentiary hearing, which was subject to cross-examination, and which the state court did not have the opportunity to consider, and counsel's earlier affidavits, left the judge with a definite and firm conviction that the state court's findings were incorrect. Having reviewed the record, the Court agrees with and adopts the Magistrate Judge's proposed finding, with the modification that the correct legal standard is "convincing" evidence, rather than "clear and convincing" evidence. No merit is found in this objection.

Respondent's next objection is that the Magistrate judge erred in determining that there was any material discrepancy between Harris' trial counsels' affidavits and their later testimony. Respondent contends that counsel testified repeatedly that they counseled Harris of the importance of presenting mitigating evidence at the punishment phase of his trial, and that Harris repeatedly instructed them not to present any mitigating evidence. This, however, is not what the Magistrate Judge proposed to find. As the Magistrate Judge pointed out on pages 33-36 of his Report and Recommendation, counsel stated in their affidavit, and the state court found, that all decisions about what evidence to present and what witnesses to call at the punishment phase of the trial were made by Harris, yet, at the evidentiary hearing, counsel testified that they called witnesses and presented

evidence at the punishment phase of the trial despite allegedly being told not to do so by Harris. The Magistrate Judge reasonably concluded that if counsel felt free to disregard their client's instructions not to present any mitigating evidence, they should not be allowed to shield their performance from scrutiny based upon those same instructions. It is found that this objection is without merit.

Respondent next objects that the Magistrate Judge erred in making an "implicit determination" that Harris' counsel's failure to develop evidence that Harris was of below average intelligence or had suffered brain damage constituted deficient performance. Respondent is correct that, had Harris' counsel testified that their decision not to introduce evidence on this point was due to the reasons Respondent now argues, the Court would determine that the failure to offer such evidence would not have been deficient performance. The Magistrate Judge, however, proposed a finding that counsel's failure to investigate this possibility, among others, was based on instructions from the client not to present mitigating evidence. The Magistrate Judge then proposed a finding that, because counsel either was mistaken as to the scope of the instructions or nevertheless felt free to disregard the instructions, his failure to investigate and present this evidence constituted deficient performance. This Court agrees with and adopts the Magistrate Judge's proposed finding, and finds Respondent's objection to any supposed "implicit determination" without merit.

Respondent next objects that, because the Magistrate Judge's "implicit determination" of the first element of the *Strickland* ineffective assistance of counsel test was erroneous, the Magistrate Judge erred in weighing the effect of the evidence in the second element of the *Strickland* test. Because the Court agrees with and adopts the Magistrate Judge's proposed finding regarding the deficient

performance element of the *Strickland* test, it finds this objection to be without merit.

Respondent next objects to the Magistrate Judge's "implicit determination" that defense counsel's failure to investigate, develop and present evidence regarding Harris' prior prison record was deficient performance. In analyzing whether there was a reasonable probability that, had Harris' counsel presented evidence of his background, the result in the punishment phase of his trial would have been different, the Magistrate Judge compared Harris' prior prison record (among other factors) with the prior prison record of two petitioners in recent and similar cases. The Magistrate Judge noted on page 26 of his Report and Recommendation that such evidence was double-edged; stating that Harris' prison conduct was "far from exemplary" but "at least showed steady improvement." The Court agrees with Respondent that even had counsel offered other evidence of Harris' background, Harris may well have decided, based upon counsel's recommendation, not to offer evidence of his behavior in prison. Indeed, had Harris presented favorable evidence of his background, the Respondent may have sought to introduce this evidence in rebuttal. The Magistrate Judge presumed this evidence would be offered in order to more accurately compare Harris' case with the other two cases. However, even if the evidence had been offered, it would not have changed the overall result of the prejudice determination, the Court finds this objection to be without merit.

Respondent next objects that the Magistrate Judge erred in considering evidence of Harris' prison conduct in analyzing whether there was a reasonable probability that, had counsel presented all of the evidence they should have presented, the result in the punishment phase of his trial

would have been different. The Court answered this objection in the previous paragraph.

Respondent next objects that the Magistrate Judge erred in stating that the reason Harris' counsel did not introduce expert testimony at the punishment phase of his trial was because they felt the jury would not be impressed by "hired gun" experts. Because the Magistrate Judge did not propose a finding that the failure to present expert testimony on the issue of Harris' future dangerousness constituted deficient performance, the Court finds this objection immaterial.

Respondent next objects to the Magistrate Judge's proposed finding that counsel's failure to investigate, develop and present evidence of Harris' background constituted deficient performance. This Court agrees with and adopts the Magistrate Judge's opinion that the failure to do so was unreasonable in light of evidence that Harris' instructions not to present such evidence were ambiguous, that counsel believed that Harris would have a change of heart, and that either Harris in fact had a change of heart or counsel felt free to disregard his instructions not to present mitigating evidence. Respondent does not address these material facts in his objection, so the Court finds the objection to be without merit.

Respondent next contends that the Magistrate Judge erred in making the "implicit finding" that Harris only instructed counsel not to call family members as witnesses at trial, but did not specifically prohibit his trial counsel from presenting evidence about his background through the use of non-family member witnesses. Respondent contends that "[t]he record is uncontroverted that Harris specifically instructed his attorneys not to call his family members to the stand and not to present evidence, from any source, regarding his childhood and family history."

The Court finds, however, that the evidence in the record was conflicting on this issue. For example, in an affidavit attached to his federal petition Harris controverted even the notion that he instructed counsel not to call his family members as witnesses at trial:

> Counsel never told me that they had spoken with any of my family members nor investigated my background in any way to build mitigating evidence to be presented at the penalty phase. Nor did counsel have any in-depth discussions with me about mitigating evidence in my background . . . . If my counsel had explained to me the importance of mitigating evidence, I certainly would have instructed them to interview my family members and to elicit testimony from them. . . .

Faced with conflicting testimony, the Magistrate Judge crafted his proposed findings on this issue by crediting some parts of each witness' testimony and discrediting others, according to what seemed most likely true. The Magistrate Judge proposed a finding that counsel most likely did not have in-depth discussions with Harris about the importance of mitigating evidence because the Magistrate Judge credited counsel's testimony that Harris initially claimed that he did not want his family involved, that he wanted to focus on the guilt-innocence phase of the trial and that he preferred the death penalty (or freedom) to a sentence of life in prison. In light of the lack of in-depth explanation by counsel, the Magistrate Judge proposed a finding that Harris did not give explicit, detailed instructions on whether counsel could, or should, investigate mitigating evidence in his background through non-family member witnesses. Having reviewed the record, the Court agrees with and adopts this finding. The Court finds that this objection is without merit.

Respondent next objects that the record does not support the Magistrate Judge's finding that "counsel completely abandoned investigating Harris' childhood" after Harris instructed them not to involve his family. The record shows that counsel did talk with Harris' mother on two or three occasions, after being told by Harris that he did not want his family involved. Other testimony by counsel supports the inference that counsel did not vigorously pursue the issue of Harris' background:

Q. Would you agree with me that an effective and competent lawyer would have discovered all of the — assuming it existed, all of the information that I've just gone over with you about [Harris]' background?

A. In this case counselor, I think an effective and competent lawyer, once he satisfied himself that his client understood the strategy decision he was making, he would not have spent his time chasing things the client didn't want him to put into the case.

The Court will modify the sentence to which Responded objected to state: "After Harris refused to allow his attorneys to involve his family members, his attorneys did not try to develop evidence of his family background through non-family members." So modified, the Court agrees with and adopts the Magistrate Judge's proposed finding.

Respondent next objects that there is no indication in the record that Harris would have agreed to the presentation of testimony, whether from family members or non-family members, concerning his childhood and family. The passage from Harris' affidavit, quoted on page 18, refutes this contention. The Court finds that this objection is without merit.

Respondent next objects that any testimony of non-family witnesses regarding Harris' background would have been hearsay. Without reviewing the specific testimony that would have been offered, the Court cannot determine whether the evidence would be inadmissible. Accordingly, it finds that this objection is without merit.

Respondent next objects that the Magistrate Judge's proposed finding that counsel believed that evidence concerning Harris' childhood and family background "would probably mean the difference between life and death" is not supported by the record. The Court notes that attorney Powell's testimony appears conflicting on this point. The Report and Recommendation quoted the following passage from trial attorney Powell's testimony at the evidentiary hearing:

Q. Did you ever tell [Harris] that failing to call family witnesses, failing to call any other witnesses at the punishment phase could, in fact, make the difference between life and death for him?

A. Would probably, in fact.

The Court notes that Powell repeated and clarified this answer during the same cross-examination:

Q. And you don't recall at any point in time telling David that this decision could, in fact, result in him receiving death instead of life, do you?

A. I think what I told David was that it probably could result.

Respondent quotes other passages from Powell's testimony in which he stated that he did not believe that, in an average case, family background information would be

the difference between life and death, and that, in this case, he believed that background and upbringing testimony would have given Harris a "chance" of getting a life sentence, but probably not a "pretty good chance." In reconciling this testimony, the Court finds that, at the time counsel raised the point with Harris, his client, it was more likely that Powell believed what he said, for three reasons: First, since Harris was first shot by the victim, this was not an "average" case; Second, counsel are presumed to believe what they say to their clients, and third, such a belief would have been reasonable under the circumstances. The Court finds that counsel's seemingly contradictory testimony resulted from his belief in the likely persuasiveness of this evidence lessening as the years passed. The Court agrees with and adopts the Magistrate Judge's proposed finding and finds that the objection is without merit.

Respondent's final objection is that the Magistrate Judge erred in proposing a finding that there was a reasonable probability that, had Harris presented mitigating evidence abou this background and upbringing, the result in the punishment phase of his trial would have been different. The Magistrate Judge proposed this finding based upon a comparison between the evidence that would have been presented in this case and the evidence presented in two similar cases, *Duhamel v. Collins,* 955 F.2d 962 (5th Cir. 1992) and *Williams v. Taylor,* 529 U.S. 362 (2000).

Respondent contends that the analysis is invalid for two reasons: First, in contrast to the Petitioner in *Williams,* Respondent contends that the record in the present case is uncontroverted that Harris would not have allowed any background and upbringing evidence to be presented. Second, even if Harris would have allowed the presentation of such evidence, the State could have effectively cross-examined his family and/or non-family background and

upbringing witnesses. Respondent's first contention is factually incorrect: As pointed out on page 18, Harris stated in the record that he would have allowed counsel to present such evidence and testimony. Respondent's prediction that the prosecution's cross-examination would have so weakened the mitigation evidence that it would have not been reasonably probable that the result in the case would have been different is too speculative to prevent this Court from agreeing with and adopting the Magistrate Judge's proposed finding. The Court finds that this objection is without merit.

In summary, the Court adopts the proposed findings and recommendations of the Magistrate Judge as to all of Harris' claims except his claim that the third special issue did not allow the jury to give effect to evidence that Harris was shot first by the victim. The Court finds meritorious Harris' objection to the Magistrate Judge's proposed finding and recommendation that that claim should be denied, and instead finds that the claim should be granted. Having found that Petitioner is entitled to partial relief on two of the claims in his petition, a conditional writ of *habeas corpus* will issue to Respondent, directing him to release the petitioner unless the State of Texas, within 180 days from the entry of the judgment, either sentences Harris to life imprisonment or commences a new sentencing hearing. An Order and Judgment will be entered.

SIGNED this24th day of September, 2001.

/s/
William Wayne Justice
Senior United States District Judge

APPENDIX G

28 U.S.C. § 2254 (before 1996 amendment)

§ 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the court of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the court of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual disputed were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional rights, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court

concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.